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A New Look At "Supervisors": Is Illinois Following the National Trend?

By James J. Powers

I. Introduction

As labor relations practitioners in our state can attest, Illinois has remained largely unaffected by the national rush to limit public sector collective bargaining rights. With the exception of a recent educational reform bill,[1] the Illinois public sector has (for now) escaped legislative labor reform.

By contrast, legislative efforts to curtail other states' public sector bargaining rights are well documented. Among others, New Jersey, Wisconsin, Ohio, Idaho, Michigan, Indiana, Nebraska, Tennessee, and Nevada have legislatively implemented a variety of modifications to their public sector collective bargaining systems. A little publicized aspect of some of these state legislative initiatives is the expansion of the number of "supervisors" or "managers" who are excluded from collective bargaining rights. For example, Nevada Governor Brian Sandoval (R) recently signed into law a bill that limits collective bargaining rights for local government physicians, civil attorneys and those officials who are responsible for budgetary decision-making.[2] Similarly, Ohio Governor John Kasich (R) signed into law "Senate Bill 5," which was recently voided by Ohio voters in a November 8, 2011 referendum.[3] If this legislation had survived, the definition of "supervisor" and "management level employee" would have been expanded. For example, the law would have prohibited the inclusion of "fire supervisory officers" (*e.g.*, lieutenants) in Ohio firefighter bargaining units.[4]

Interestingly, Illinois has witnessed similar, albeit less successful efforts. For example, the Illinois House of Representatives passed an amended form of Senate Bill 3644 in January 2011. The bill would have excluded from the definition of "public employee" so-called legislative liaisons, senior public service administrators, attorneys under the jurisdiction of the Office of the Attorney General, and other various executive level officials. Senate Bill 3644 "died," however, with the end of the 96th General Assembly. A similar bill that passed the House of Representatives in May 2011 has failed to gain any traction in the State Senate.[5] Not surprisingly, both pieces of legislation have been decried by organized labor. One Illinois labor leader was quoted: "Do not kid yourself . . . This is an anti-labor bill."[6] On the other hand, proponents of Senate Bill 3644 have insisted that without such legislation, there will be "virtually no management at a variety of agencies and facilities."[7]

Statistics appear to support the proponents of the bill. According to a *Chicago Sun-Times* article, approximately 10,100 state employees have sought collective bargaining rights since 2003, as compared to 2,300 total State employees from 1995 to 2003.[8] By extension, it was reported in March 2011 that the union density rate among State employees could rise to 96.5 percent based on representation petitions that were pending at the Illinois Labor Relations Board ("ILRB").[9] Although some commentators point to years of pay freezes as a reason why the State's mid-level managers have flocked to unions, others maintain that a line must be drawn at some point to the unionization efforts, especially among mid-level State supervisors. For example, House Majority Leader Barbara Flynn Currie (D) has stated, "We strongly support union representation and collective bargaining for many state workers, but the union system only works when there are workers and managers. . . . We are looking at a situation where there is virtually no management at a variety of agencies and facilities."[10]

Despite these concerns, unionization efforts in Illinois have proceeded unabated, at least, that is, until recently. What the Illinois General Assembly has been unable to achieve via legislation, employers have arguably been able to achieve through judicial review. And, the Illinois Labor Relations Board ("ILRB") may be listening, if

INSIDE

decisions within the last twelve months are any indication.

This article will examine the treatment of "supervisory" status under the Illinois Public Labor Relations Act. Specifically, the article will examine the historical ebb and flow of the ILRB's interpretation and application of the definition of "supervisory employee," and the sometimes harsh reaction that those applications have received from State appellate courts. Based on this historical analysis, several potential trends are possible for the future of "supervisory employees" under the IPLRA.

II. Statutory Definition of a "Supervisor" Under the IPLRA

The IPLRA excludes "supervisory employees" from the definition of "public employee."[11] As such, "supervisory employees" do not enjoy collective bargaining rights, unless an employer voluntarily decides to bargain with them.[12]

The definition of "supervisory employee" under the IPLRA has seen relatively few changes since the early 1990's. According to its plain language, Section 3(r) of the IPLRA defines a "supervisor" as:

> an employee [1] whose principal work is substantially different from that of his or her subordinates and [2] who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of those actions, if the exercise of that authority is not of a merely routine or clerical nature, but [3] requires the consistent use of independent judgment. Except with respect to police employment, the term "supervisor" includes [4] only those individuals who devote a preponderance of their employment time to exercising that authority, State supervisors notwithstanding.[13]

As the bracketed numbers in the above quote demonstrate, there are essentially four elements to the test for supervisory status: (1) the performance of work that is substantially different from that of one's subordinates; (2) the exercise (or effective recommendation) of at least one of the 11 indicia of supervisory authority; (3) the performance of supervisory authority with "independent judgment;" and (4) the exercise of that supervisory authority for a preponderance of an employee's employment time. The preponderance prong does not apply, however, to police personnel. The ILRB has held that the party seeking to establish a supervisory exclusion has the burden of proving each element of the test.[14] Commentators have long recognized that this statutory test is much harder to satisfy than the standard for proving supervisory status under the National Labor Relations Act.[15]

A 1990 Illinois Supreme Court decision arguably made that test even harder to meet (at least for non-police personnel). In *City of Freeport v. Illinois State Labor Relations Board*, the court consolidated two supervisory cases for review, one involving police sergeants, and the other involving fire lieutenants.[16] The court reached different conclusions in these cases, thereby setting a pattern that would continue throughout the next decade. In the *Freeport* case, the Illinois Supreme Court rejected the ILRB's[17] interpretation of Section 3(r) that "consistent" use of independent judgment in the police context meant that there must be evidence that police personnel *frequently* exercise their supervisory authority.[18] Instead, the court relied on the lack of the "preponderance of time" requirement as proof that the General Assembly intended that supervisory authority alone was enough to qualify a police official as a "supervisor." In other words, as long as a police official has the authority to exercise one or more indicia of supervisory authority in the first instance, he or she qualifies as a supervisor, regardless of the *frequency* with which that official actually exercises that authority. In this respect, the Illinois Supreme Court offered the following analysis in connection with the police sergeants' authority to issue discipline:

> It is the authority to use independent judgment in imposing discipline, rather than how often such discipline is imposed, which is important. It would be absurd to require a

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> supervisor to continuously discipline subordinates who do not deserve discipline. The supervisor's authority to discipline is what distinguishes him from his subordinates. The fact that the ranking officers exercise this authority infrequently is proof that the patrol officers do not warrant discipline rather than that their supervisors do not use independent judgment when they impose discipline. The ranking officers clearly satisfy the third prong of the supervisory definition with respect to discipline.[19]

In contrast, in *Freeport's* companion case, *Village of Wheeling*, the court imposed a more rigorous supervisory evidentiary standard in the fire context (and by extension, for all non-police personnel).[20] Specifically, the Illinois Supreme Court interpreted the preponderance requirement as meaning that a fire lieutenant literally had to perform supervisory duties for the preponderance of his or her employment time to qualify as a "supervisor." Taking "discipline" for example, the court theorized that it was not enough that a fire lieutenant had the authority to *potentially* discipline subordinates; rather, because a fire lieutenant *rarely* disciplined subordinates, the lieutenant could not satisfy the "preponderance" prong of the test for supervisory status.[21] As a practical matter, the court's ruling means that a fire lieutenant in a "well-behaved" department that rarely witnesses acts of misconduct cannot qualify as a "supervisor" (at least based on the supervisor indicium of discipline), because the lieutenant literally does not actively "discipline" his or her subordinates for a preponderance of his or employment time.

For obvious reasons, this standard is quiet difficult for any non-police supervisor to meet. By extension, this ruling inevitably dampened the interest of public employers in raising supervisory arguments in the fire context (or any other non-police context, for that matter).

III. ILRB Overwhelmingly Rejects Union Organizing Attempts Among Police Command Staff During the 1990s

For the next ten years, it was commonly accepted among Illinois labor law practitioners that the ILRB was more willing to find supervisory status among police personnel than it was in the non-police context. A review of ILRB supervisory cases during the 1990s reinforces that perception. For example, out of 18 police supervisory cases decided from 1991 through 2000, the ILRB (or one of its administrative law judges) found supervisory status in approximately 14 (78 percent).[22] At the same time, the vast majority of non-police cases resulted in a finding that the positions in question were nonsupervisory, often because of the preponderance prong and the Illinois Supreme Court's decision in *Village of Wheeling*.[23]

IV. "The Times They Are A Changin'"[24]

An interesting development took place, however, after calendar year 2000. While the ILRB still consistently declined to designate non-police personnel as "supervisors," the tide began to turn for police command staff. For example, out of approximately 44 police supervisory cases decided from 2001 through 2010, the ILRB and/or one of its ALJs found supervisory status in only eight (18 percent).[25]

The reason behind this shift in finding supervisory status is unclear. For example, the General Assembly had not amended Section 3(r)'s test for police supervisory status during this time period. Nor did an appellate court or the ILRB announce a new legal standard for interpreting Section 3(r)'s definition of "supervisory employee" in the police context. Despite the lack of an obvious "triggering" event (as occurred, for example, after the Illinois Supreme Court's *Freeport* decision), it is safe to assume that "coincidence" cannot entirely account for such a statistical anomaly.

Several themes emerge when one reviews the Board's police supervisory cases from the last decade:

- The ILRB increasingly declined to find supervisory status based solely on the authority to "direct;" rather, the ILRB relied on the principle that for "direction" to qualify as supervisory authority, the putative supervisor must have the ability to affect a subordinate's basic terms and conditions of employment in another way, such as through discipline, rewards or performance evaluations.[26] This contrasts with past cases that found that the authority to direct, by itself, qualified an individual as a "supervisor."[27]
- The ILRB frequently discounted decisions reached by a group of putative supervisors (typically through consensus decision-making), claiming that such group decision-making (even if performed without the input of a higher level official) was not enough to establish the individual members' "independent judgment."[28]
- The ILRB strayed from the Illinois Supreme Court's pronouncement in *City of Freeport* that the frequency with which an individual exercises supervisory authority is irrelevant. Instead, the ILRB began demanding specific examples of an individual's exercise of supervi-

sory authority, especially in the discipline context. For example, where employers could not establish a single example of an individual issuing a form of discipline (e.g., where no subordinate engaged in misconduct), the Board tended to reject claims of supervisory authority.[29]

•Even where the record evidence established that certain individuals possessed supervisory authority, while others did not, the ILRB proceeded to reject supervisory status for the entire group (instead of designating supervisory status on an individual basis).[30]

•In terms of effective recommendations, the ILRB tended to find that even an occasional rejection or modification of a supervisory recommendation was enough to destroy the "effectiveness" of the recommendation.[31] This contrasted with past cases that had held that occasional rejections did not destroy the "effectiveness" of a recommendation, where in most cases a superior official accepts the recommendation after some type of review.[32]

Significantly, the Board never once explicitly overruled its prior case law, or openly disagreed with past appellate court decisions. Instead, the ILRB gradually incorporated the above-cited legal principles into its legal analysis, thereby avoiding the perception that a "change in law" was taking place.

V. Appellate Court Response to The ILRB's New-Found Hesitance to Find Police Supervisory Status

As the ILRB increasingly declined to find supervisory status among police command staff during the 2000s, a handful of employers appealed the Board's actions. Despite the deference appellate courts are supposed to show the ILRB in the administrative review context,[33] the ILRB experienced a startling appellate reversal rate from 2000 through 2011. For example, out of approximately 13 cases where an appellate court reviewed the Board's rejection of supervisory status for police command staff,[34] appellate courts reversed the ILRB seven times (roughly a 54 percent reversal rate).[35] Indeed, for a time during the 2000s, labor law practitioners began to assume that in order to have any success in establishing the supervisory status of police command staff, one had to pursue an appeal all the way to the appellate court level.

VI. Increase in Petitions Seeking to Represent Putative State Supervisory-Managerial Employees

While the ILRB was resolving an unprecedented number of police supervisory cases (and, in some cases, defending those decisions before an appellate court), the ILRB also witnessed a significant increase in representation petitions by unions such as AFSCME Council 31, which sought to represent mid-level State supervisors and managers.[36] For example, job titles that one normally associates with management became fair game for inclusion in already existing bargaining units. Employees holding job titles such as: "senior public service administrators," "executive chief pilots," "nuclear safety administrators," "activity therapist supervisors," "mental health administrators," "pharmacy directors," "telecommunications supervisors" and "public aid quality control supervisors" were all found to be non-supervisory employees, who by extension are entitled to collective bargaining rights under the IPLRA.[37] By far, AFSCME Council 31 was the most active labor organization during this time period in terms of seeking representation rights for putative mid-level State supervisors.[38]

A handful of appellate court decisions issued at the end of 2010, however, have signaled a possible check on the ILRB's continued certification of mid-level State supervisors and managers. In three cases decided on December 28, 2010 (one reported and two unreported), the Illinois Appellate Court for the Fourth District ruled that the ILRB erred by not granting a fact-finding hearing to the State of Illinois as to the managerial status[39] of administrative law judges at the Illinois Department of Healthcare and Family Services, Commerce Commission and Property Tax Appeal Board.[40] In a fourth (reported) case, the Fourth District reversed the ILRB, finding that administrative law judges with the Illinois Human Rights Commission qualify as managerial employees as a matter of law, meaning they do not enjoy collective bargaining rights under the IPLRA.[41]

A more recent case demonstrates an even more dramatic rejection of the ILRB's application of the statutory test for supervisory and managerial employees. In September 2011, the Illinois Appellate Court for the Fourth District reversed the ILRB's finding that 44 State Public Service Administrators (Option 2) were neither confidential, supervisory or managerial employees within the meaning of the IPLRA.[42] In doing so, the Fourth District stated in the decision epilogue that during oral argument, the Court asked AFSCME's counsel "which of the tens of thousands of State Executive branch employees would be excluded from collective bargaining under the Act."[43] AFSCME's coun-

sel responded that "AFSCME believed that perhaps 'the Governor and his policy team' would not be included because they report directly to the citizenry, but that most everyone else could be included."[44] The Court disagreed with this "extraordinarily broad" construction of the statutory exclusions found under the IPLRA, noting that if the General Assembly intended to allow all State employees but for the Governor and his policy making team to organize, it would have simply said so instead of resorting to the use of managerial, supervisory and confidential exclusions.[45]

VII. Is The ILRB Listening?

In the wake of the above-described appellate reversals and proposed legislative initiatives, the ILRB appears to have begun a not too subtle shift back to pre-2000 supervisory decision-making rates. For example, in 2011 alone, the ILRB has decided six police supervisory cases, finding supervisory status in five of them.[46] Amazingly, this almost equals the sum total of decisions in favor of supervisory status that the ILRB issued during the entire decade of the 2000s.

However, the ILRB's decision in *City of Washington* may be the most significant for public employers.[47] There, the ILRB permitted an employer to raise a supervisory status argument for its police sergeants, even though it had previously agreed to the inclusion of such sergeants in a bargaining unit with rank-and-file police officers. Significantly, the ILRB did not require the employer to prove "changed circumstances," or otherwise hold the employer to its prior "stipulation."[48] Rather, the ILRB declared "a unit clarification petition may be appropriate when it seeks to exclude individuals from a unit on the basis that they are statutorily exempt from collective bargaining under the Act."[49]

Such a ruling is significant, especially for those employers who strategically decided in the 2000s not to raise a supervisory status challenge in the context of a union representation petition. According to the logic of *City of Washington*, a public employer can *at any time* seek the exclusion of putative supervisors by filing a unit clarification petition.[50] Thus, the ILRB may soon see an increased number of unit clarification petitions filed by those employers who are rethinking the wisdom of allowing their supervisory police command staff to belong to collective bargaining units.

The ILRB also appears to be revising its stance regarding non-police State supervisors. In 2011 alone, the ILRB has decided approximately 10 State employee cases, seven of which resulted in a statutory exclusion being applied in the State's favor (a 70 percent success rate).[51]

VIII. Will the ILRB Follow National Trends?

At this point, it appears doubtful that Illinois will follow the lead of states such as Wisconsin and Ohio in terms of the wholesale legislative rollback of collective bargaining rights for certain managerial and supervisory-level employees. The political climate in Illinois does not appear ripe for such drastic measures. Perhaps such measures will be deemed unnecessary if the ILRB continues to exhibit moderation in how it applies the IPLRA's statutory exclusions.

Regardless of future events, the fact remains that Illinois has witnessed a startling swing in decision-making by the ILRB in the last decade, which is eerily reminiscent of the vacillations seen at the National Labor Relations Board ("NLRB"). Commentators long have recognized that as new NLRB Members are appointed by different presidential administrations, the NLRB itself shifts its decision-making patterns, sometimes explicitly, other times more subtly.[52] Such shifts have sometimes been criticized by commentators, primarily due to the legal uncertainty that is created for employers and labor organizations alike, who cannot anticipate from one year to the next how administrative decision-making will change.[53]

Such an approach to administrative decision-making only serves to polarize members of the labor-management community, who all have a vested interest in the decision-making outcome.[54] Not surprisingly, a group that believes it was disadvantaged during one administrative phase naturally feels the need to regain what it supposedly lost (and then some). The greater the loss during one phase, the more the group attempts to regain during the next phase, resulting in increasingly greater swings of the political pendulum from one extreme to the other.[55]

While it is unclear whether political pressures were at play during the last decade at the ILRB, what is clear is that extreme decision-making swings are not in labor or management's best interests. Time will tell whether the ILRB's sudden shift in its supervisory decision-making is temporary in nature, or reflective of a new administrative phase that attempts to recalibrate the ILRB's balance from the decision-making patterns it exhibited in the 2000s. ♦

NOTES

1. 2011 III. Legis. Serv. P.A. 97-8 (S.B.
2. 2011 NV S.B. 98 (NS).
3. 2011 Ohio Laws File 10 (Am. Sub. S.B. 5).
4. OHIO REV. CODE §§ 4117.01(C)(10), (F), and (K).
5. Senate Bill 1556 was referred to the Senate Assignments Committee on July 23, 2011, where it still remains. *See* 2011 IL S.B. 1556 (NS).
6. Chris Wetterich, *No vote yet on taxes; bill would limit workers' bargaining rights*, STATE JOURNAL-REGISTER, Jan 9, 2011.
7. John O'Connor, *State union numbers surge; Quinn seeks to limit member-eligible jobs, rescind coverage for many who have joined*, CHI. SUN-TIMES, Mar. 27, 2011, at 19.
8. *See id.*
9. *See id.*
10. *See id.*
11. *See 5* ILL. COMP. STAT. 315/3(n) 2005.
12. *See* 5 ILCS 315/3(s)(2)2005 ("[A] public employer may agree to permit its supervisory employees to form bargaining units and may bargain with those units.").
13. 5 ILCS 315/3(r)2005. Section 3(r) contains a special firefighter definition of a "supervisor," which applies to those fire departments with no intervening rank between the fire chief and the next highest rank (typically called shift commanders). In those circumstances, up to three shift commanders may be designated as "supervisory employees" by the employer. *See id.*
14. *See Chief Judge of the Circuit Court of Cook Cnty.*, 18 PERI ¶ 2016 (ILRB State Panel 2002).
15. *See* Sally J. Whiteside et al., *Illinois Public Labor Relations Laws: A Commentary and Analysis*, 68 CHI.-KENT L. REV. 883 (1984) (noting that during House debates, Representative Davis opined that the definition of "supervisor" was so narrow that very few individuals would ever qualify).
16. 135 Ill.2d 499, 554 N.E.2d 155 (1990).
17. At the time, the ILRB was known by its former name, the Illinois State Labor Relations Board. In 2000, the Illinois State Labor Relations Board was abolished, and replaced with the ILRB. *See* 5 ILCS 315/5.1. The terms of all ILRB Members were subsequently terminated as of June 30, 2003, soon after Governor Rod Blagojevich took office. *See* 5 ILCS 315/5(a-5), (b).
18. *See City of Freeport*, 135 Ill.2d at 520, 554 N.E.2d at 166. The Court found that the police sergeants in Freeport satisfied the first two prongs of the test for supervisory status, i.e., substantially different work and the exercise of supervisory authority.
19. *Id.* at 521, 554 N.E.2d at 166 (citation omitted).
20. The court agreed that the fire lieutenants satisfied the first three prongs of the test for supervisory status in connection with the authority to "discipline."
21. *Id.* at 533, 554 N.E.2d at 171 ("In this case, the evidence demonstrates that the lieutenants rarely exercise their authority to suspend or discipline firefighters. It is therefore clear that the lieutenants do not spend more time exercising this authority than they devote to any other function. The lieutenants therefore do not satisfy the fourth prong of the supervisory definition.").

22. These numbers reflect originally filed representation or unit clarification petitions that resulted in a Board or ALJ decision between 1991 and 2000. *Vill. of Justice*, 17 PERI ¶ 2007 (ISLRB 2000) (no supervisor); *Cnty. of Cook*, 17 PERI ¶ 3002 (ILLRB 2000) (no supervisor). *City of Tuscola*, 15 PERI ¶ 2034 (ISLRB 1999) (no supervisory status); *City of Colona*, 15 PERI ¶ 2039 (ISLRB ALJ 1999) (split - one supervisor); *Vill. of Matteson*, 14 PERI ¶ 2018 (ISLRB 1998) (supervisor); *NE. Univ.*, 13 PERI ¶ 2035 (ISLRB ALJ 1997) (supervisor); *Vill. of Romeoville*, 12 PERI ¶ 2022 (ISLRB ALJ 1996) (supervisor); *State of Ill. (Dep't of Cent. Mgmt Serv.)*, 12 PERI ¶ 2032 (ISLRB 1996) (supervisors); *Vill.of Midlothian*, 11 PERI ¶ 2028 (ISLRB ALJ 1995) (supervisor); *Cnty. of McHenry*, 11 PERI ¶ 2010 (ISLRB 1994) (supervisor); *City of Crest Hill*, 11 PERI ¶ 2006 (ISLRB ALJ 1994); *Vill. of Winfield*, 11 PERI ¶ 2005 (ISLRB 1994) (supervisor); *Vill. of Manteno*, 10 PERI ¶ 2046 (ISLRB ALJ 1994) (supervisor); *City of Carrollton*, 10 PERI ¶ 2040 (ISLRB ALJ 1994) (no supervisor); *City of Mt. Vernon*, 9 PERI ¶ 2022 (ISLRB 1993) (supervisor); *Vill. of Glen Carbon*, 8 PERI ¶ 2026 (ISLRB 1992) (supervisor); *City of Elgin*, 8 PERI ¶ 2005 (ISLRB 1991) (supervisor); *See Vill. of Cary*, 7 PERI ¶ 2037 (ISLRB ALJ 1991) (supervisor).

23. Based on a review of non-police ILRB and ALJ supervisory decisions from 1991 through 2000 (which arose from representation or unit clarification petitions), supervisory status was found in only 5 of 41 cases (12%). *See Cnty. of Kankakee*, 17 PERI ¶ 2001 (ISLRB ALJ 2000) (no supervisor); *Cnty. of Lake*, 16 PERI ¶ 2036 (ISLRB 2000) (no supervisor); *Chicago Transit Auth.*, 16 PERI ¶ 3026 (ILLRB ALJ 2000) (no supervisor) *Cnty. of Cook*, 16 PERI ¶ 3009 (ILLRB 1999) (no supervisor); *Cnty. of Cook*, 15 PERI ¶ 3022 (ILLRB 1999) (supervisory status found); *City of Chicago*, 15 PERI ¶ 3005 (ILLRB ALJ 1998) (no supervisor); *Vill. of Brookfield*, 15 PERI ¶ 2033 (ISLRB 1999) (no supervisor); *Cnty. of McHenry*, 15 PERI ¶ 2014 (ISLRB 1999) (no supervisor); *Vill. of Hoffman Estates*, 14 PERI ¶ 2048 (ISLRB 1998) (no supervisor); *Cnty. of Du Page*, 14 PERI ¶ 2040 (ISLRB ALJ 1998) (no supervisor); *Dep't of Cent. Mgmt Serv.*, 14 PERI ¶ 2036 (ISLRB ALJ 1998) (no supervisor); *Nw. Mosquito Abatement Dist.*, 13 PERI ¶ 2042 (ISLRB 1997) (no supervisor); *City of Bloomington*, 13 PERI ¶ 2041 (ISLRB 1997) (no supervisor); *Cnty. of Cook (Recorder of Deeds)*, 13 PERI ¶ 3013 (ILLRB ALJ 1997) (no supervisor); *Cnty. of Cook*, 12 PERI ¶ 3005 (ILLRB ALJ 1995) (no supervisor); *Granite City Pub. Lib.*, 12 PERI ¶ 2025 (ISLRB ALJ 1996) (no supervisor); *State of Ill. (Dep't of Cent. Mgmt Serv.)*, 12 PERI ¶ 2024 (ISLRB 1996) (no supervisor); *Cnty. of Saline*, 12 PERI ¶ 2013 (ISLRB ALJ 1996) (no supervisor); *Dept' of Cent. Mgmt Serv.*, 11 PERI ¶ 2029 (ISLRB 1995) (*no supervisor*); *Dep't of Cent. Mgmt Serv.*, 11 PERI ¶ 2021 (ISLRB 1995) (supervisory status found); *State of Ill. (Dep't of Cent. Mgmt Serv. - Dep't of Corrections)*, 11 PERI ¶ 2011 (ISLRB 1994) (no supervisor); *Cnty. of Winnebago*, 10 PERI ¶ 2028 (ISLRB 1994) (no supervisor); *City of Chicago*, 10 PERI ¶ 3017 (ILLRB 1994) (no supervisor); *Peoria Hous. Auth.*, 10 PERI ¶ 2020 (ISLRB 1994) (no supervisor); *City of Chicago (Dep't of Law)*, 10 PERI ¶ 3018 (ILLRB 1994) (no supervisor); *City of Chicago (Chicago Pub. Lib.)*, 10 PERI ¶ 3016 (ILLRB 1994) (no supervisor); *City of Chicago (Dep't of Aviation)*, 10 PERI ¶ 3014 (ILLRB ALJ 1994) (supervisory status found); *City of Chicago (Mayor's Office of Info. & Inquiry)*, 10 PERI ¶ 3003 (ILLRB 1993) (no supervisor); *Carpentersville Countryside Fire Prot. Dist.*, 10 PERI ¶ 2016 (ISLRB 1994) (no supervisor); *Quincy Park Dist.*, 10 PERI ¶ 2015 (ISLRB ALJ 1994) (no supervisor); *City of Sparta*, 9 PERI ¶ 2029 (ISLRB 1993) (no supervisor); *Chicago Park Dist.*, 9 PERI ¶ 3007 (ILLRB 1993) (no supervisor); *City of Chicago*, 9 PERI ¶ 3012 (ILLRB 1993) (supervisory status found); *Chief Judge of the Cir. Ct. of Cook Cnty.*, 9 PERI ¶ 2033 (ISLRB 1993) (no supervisor); *Ill. Dep't of Cent. Mgmt Serv. (Dep't of Children & Family Serv.)*, 8 PERI ¶ 2037 (ISLRB 1992) (no supervisor); *City of Mattoon*, 9 PERI ¶ 2021 (ISLRB 1992) (supervisory status found); *Cnty. of Lake (Sheriff's Dep't)*, 8 PERI ¶ 2051 (ISLRB 1992) (no supervisor); *Cnty. of Jackson (Jackson Cnty. Nursing Home)*, 8 PERI ¶ 2041 (ISLRB ALJ 1992) (no supervisor); *Vill. of Elk Grove Vill.*, 8 PERI ¶ 2015 (ISLRB 1992) (no supervisor); *City of Naperville*, 8 PERI ¶ 2016 (ISLRB 1992) (no supervisor); *City of Aurora*, 7 PERI ¶ 2026 (ISLRB 1991) (no supervisor).

24. Bob Dylan, *The Times They Are A Changin', on The Times They Are A Changin'* (Columbia Records 1964).

25. *See Vill. of Streamwood*, 26 PERI ¶ 134 (ILRB 2010) (supervisors); *Vill. of Hinsdale*, 22 PERI ¶176 (ILRB 2006) (supervisors); *Vill. of Niles*, 22 PERI ¶ 83 (ILRB 2006) (supervisors); *Vill. of Winnetka*, 20 PERI ¶ 132 (ILRB ALJ 2004) (supervisors); *Vill. of Woodridge*, 20 PERI ¶ 125 (ILRB 2004) (supervisors); *Vill. of Bellwood*, 19 PERI ¶ 106 (ILRB 2003) (supervisors); *Vill. of Hazel Crest*, 18 PERI ¶ 2006 (ILRB ALJ 2001) (supervisors); *Vill. of Homewood*, 18 PERI ¶ 2002 (ILRB ALJ 2001) (supervisors). Two reported appellate courts decisions affirmed two of these supervisory findings. *See, e.g., Metro. Alliance of Police, Bellwood Command Chapter No. 339 v. ILRB*, 354 Ill. App. 3d 672, 820 N.E.2d 1107 (1st Dist. 2004); *Metro. Alliance of Police, Vill. of Woodridge Police Sergeants Chapter No. 132 v. ILRB*, 362 Ill. App. 3d 469, 839 N.E.2d 1073 (2d Dist. 2005).

26. *See Vill. of Bellwood*, 19 PERI ¶ 106 (ILRB 2003).

27. *See Nat'l Union of Hosp. & Health Care Emp. v. Cnty. of Cook* (*Cook Cnty. Hosp.*), 295 Ill. App. 3d 1012, 692 N.E.2d 1253 (1st Dist. 1998) (finding supervisory status based only on the authority to "direct"). In the private sector, the National Labor Relations Board similarly has found that the authority to "assign" or "direct" qualifies an individual as a supervisor without the need for additional indicia. *See Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 689 (2006).

28. *See Vill. of Western Springs*, 24 PERI ¶ 24 (ILRB 2008).

29. *See Vill. of Bolingbrook*, 19 PERI ¶ 125 (ILRB 2003) (where there was no evidence of a single instance when a counseling letter ever led to more serious discipline, employer failed to prove that sergeants had authority to discipline).

30. *See Vill. of New Lenox*, 23 PERI ¶ 104 (ILRB 2007).

31. *See Vill. of Burr Ridge*, 23 PERI ¶ 102 (ILRB 2007) (single occasion of chief reversing a performance evaluation recommendation was enough to destroy the "effectiveness" of the recommendation).

32. *See City of Peru v. ISLRB*, 167 Ill. App. 3d 284, 521 N.E.2d 108 (3d Dist. 1988) (police sergeants were supervisors, where 5 of 6 disciplinary recommendations were ultimately accepted by the police chief after conducting independent interviews of the accused officers).

33. Generally, appellate courts apply the "clearly erroneous" standard to administrative agency decisions involving mixed questions of law and fact. *See, e.g., City of Belvidere v. ISLRB*, 181 Ill.2d 191, 205, 692 N.E.2d 295, 302 (Ill. 1998).

34. This number is based on a Westlaw search of both reported and unreported appellate court decisions, as well as the author's own personal knowledge of the existence of additional appellate decisions. The search, performed in the Westlaw PERI database was, su (appellate court" and supervisor:) and da (aft 1/1/2000 and bef 12/1/2011). Because of the tendency of Illinois appellate courts to issue unreported "Rule 23" Orders, there may be more than 13 appellate decisions involving the review of the ILRB's rejection of supervisory status.

35. In another case, the appellate court remanded and directed the ILRB to hold a fact-finding hearing on the supervisory status of police sergeants. *See Vill. of Oak Brook v. ILRB*, 27 PERI ¶ 41 (2d Dist. 2011) (Rule 23 Order) (reversed ILRB); *City of Sandwich v. ILRB*, 406 Ill. App. 3d 1006, 942 N.E.2d 675 (2d Dist. 2011) (reversed ILRB); *Cnty. of Winnebago v. ILRB*, 26 PERI ¶ 100 (2d Dist. 2010) (Rule 23 Order) (remanded for hearing); *Vill. of Maryville v. I LRB*, 402 Ill. App. 3d 369, 932 N.E.2d 558 (5th Dist. 2010) (reversed ILRB); *Vill. of Broadview v. ILRB*, 26 PERI ¶ 66 (1st Dist. 2010) (Rule 23 Order) (affirmed ILRB); *Vill. of W. Springs v. ILRB*, 25 PERI ¶147 (1st Dist. 2009) (Rule 23 Order) (affirmed ILRB); *Vill. of S. Holland v. ILR B*, 25 PERI ¶148 (1st Dist. 2009) (Rule 23 Order) (reversed ILRB); *Town of Cicero v. ILRB*, 25 PERI ¶150 (1st Dist. 2009) (Rule 23 Order) (reversed ILRB); *Vill. of Hazel Crest v. ILRB*, 385 Ill. App. 3d 109, 895 N.E.2d 1082 (1st Dist. 2008) (reversed ILRB); *Vill. of Bolingbrook v. ILRB*, 20 PERI ¶ 186 (3d Dist. 2003) (Rule 23 Order) (affirmed ILRB).

36. Illinois Labor Relations Board, AFSCME Representation Petitions (State of Illinois as Employer) 2004-2011 (2011) (showing the increased amount of AFSCME representation petitions filed for public services administrators and senior public administrators employed by the State of Illinois in recent years: 2004 – 26 representation petitions filed; 2006 – 36 representation petitions filed; 2007 – 51 representation petitions filed; 2008 – 29 representation petitions filed; 2009 – 88 representation petitions filed; 2010 – 68 representations petitions filed). E-mail from Jonathan Brosnan, Executive Director, Illinois Labor Relations Board, to Ryan Thoma, Student Editor, Illinois Public Employee Relations Report (Oct. 17, 2011 5:49 EST) (providing a list of AFSCME representation petitions filed for all public services administrators and senior public administrators where the State of Illinois was the employer from 2004-2011).

37. *See Dep't of Cent. Mgmt. Servs.*, 28 PERI ¶ 26 (ILRB Gen. Counsel 2011) (nuclear safety administrators II as supervisors and managerial employees); *Dep't of Cent. Mgmt. Servs.*, 28 PERI ¶ 16 (ILRB State Panel 2011) (finding one attorney at the Department of Human Services to be a supervisor); *Dep't of Cent. Mgmt. Servs.*, 27 PERI ¶ 71 (ILRB State Panel 2011) (public service administrator as supervisors); *Dep't of Cent. Mgmt. Servs.*, 27 PERI ¶ 56 (ILRB State Panel 2011) (foreign service economic development executive IIs as managerial employees); *Dep't of Cent. Mgmt. Servs.*, 27 PERI ¶ 30 (ILRB State Panel 2011) (remanding for fact-finding hearing regarding the managerial status of staff attorneys in Illinois Commerce Commission); *Dep't of Cent. Mgmt. Servs.*, 27 PERI ¶ 31 (ILRB State Panel 2011) (split decision, finding one of four public service administrators to be confidential employees); *Dep't of Cent. Mgmt. Servs.*, 27 PERI ¶ 10 (ILRB State Panel 2011) (senior public service administrators were not supervisors); *Dep't of Cent. Mgmt. Servs.*, 26 PERI ¶ 155 (ILRB State Panel 2011) (senior public service administrators did not qualify as supervisors or managerial employees); *Dep't of Cent. Mgmt. Servs.*, 26 PERI ¶ 152 (ILRB State Panel 2011) (split decision, finding two of five executive secretary IIIs to be confidential employees); *Dep't of Cent. Mgmt. Servs.*, 26 PERI ¶ 149 (ILRB State Panel 2011) (senior public service administrators did not qualify as supervisors or managerial employees).

38. For AFSCME activity, *see supra* note 36.

39. Section 3(j) of the IPLRA defines a "managerial employee" as "an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices." 5 ILCS 315/3 (West 2010).

40. *See Dep't of Cent. Mgmt. Servs./Ill. Commerce Comm'n v. ILRB*, 406 Ill. App. 3d 766, 943 N.E.2d 1136 (4th Dist. 2010); *Dep't of Cent. Mgmt. Servs.*, 27 PERI ¶ 11 (4th Dist. 2010) (Rule 23 Order); *Dep't of Cent. Mgmt. Servs.*, 27 PERI ¶ 2 (4th Dist. 2010) (Rule 23 Order).

41. *See Dep't of Cent. Mgmt. Servs./Ill. Human Rights Comm'n*, v. *ILRB*, 406 Ill. App. 3d 310, 943 N.E.2d 1136.

42. *See Dep't of Cent Mgmt Servs v. ILRB*, 2011 IL App (4th) 090966 (Sept. 28, 2011).

43. See *id* ¶ 224.

44. *Id.*

45. *See id.*

46. *See City of Carbondale*, 27 PERI ¶ 68 (ILRB State Panel 2011) (supervisors); *City of Springfield*, 27 PERI ¶ 69 (ILRB State Panel 2011) (supervisors); *Vill. of Roselle*, 27 PERI ¶ 59 (ILRB State Panel 2011) (supervisors); *Vill. of Lake Zurich*, 27 PERI ¶ 26 (ILRB State Panel 2011) (supervisors); *City of Washington*, 27 PERI ¶ 3 (ILRB State Panel 2011) (supervisors); *Vill. of Richton Park* (*Police Dep't*), 26 PERI ¶ 151

(ILRB State Panel 2011) (not supervisors).
47. 27 PERI ¶ 3.
48. *See id.*
49. *See id.*
50. *See id.*
51. *See supra* note 39.
52. *See generally* Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking,* 37 ADMIN. L. REV. 163 (1985) (discussing the long history of policy reversals at the NLRB); William N. Cooke & Frederick H. Gautschi III, *Political Bias in NLRB Unfair Labor Practice Decisions,* 35 INDUS. & LABOR REL. REV. 539 (1982) (empirical examination of NLRB adjudication of ULP Complaints and presidential appointment process).
53. Estreicher, *supra* note 48, at 174-75.
54. *Cf.* James J. Brudney, *Isolated & Politicized: The NLRB's Uncertain Future,* 26 COMP. LABOR LAW & POL'Y J. 221, 250 (2005) (describing the growing politicization of NLRB membership, which in turn invites "both labor and management litigants to show less respect for . . . prior decisions").
55. *Cf.* Bill Lurye, *On the Legitimacy of a Mathematical Evaluation of NLRB Decision Making,* 26 A.B.A. J. LAB. & EMP.L. 427, 428 (2011) (estimating the precedent reversal rate of the Clinton NLRB at 0.51%, and the Bush II NLRB precedent reversal rate at 0.73% (citing G. Roger King, *National Labor Relations Board: Case Law Development Comparisons Between Clinton & Bush II Boards,* 26 A.B.A. J. LAB. & EMP. L. 23, 30 (2010)). ♦

Recent Developments

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the collective bargaining statutes.

IELRA DEVELOPMENTS

Bargaining Units

In *Board of Trustees of the University of Illinois and UIC United Faculty, AFT-IFT, AAUP,* Case No. 2011-RC-011-C (IELRB 2011), the IELRB certified a bargaining unit containing tenure-stream and non-tenure track faculty at the University of Illinois at Chicago. The case arose from a majority interest petition filed by the union seeking to represent all full-time tenure or tenure track faculty; all full-time, non-tenure track faculty who possess a terminal degree appropriate to the academic unit in which the faculty member is employed; and all full-time non-tenure track faculty without the appropriate terminal degree who have been employed four consecutive semesters, excluding summer terms. All faculty of the Colleges of Pharmacy, Medicine and Dentistry were excluded. An ALJ had found the bargaining unit appropriate. The IELRB affirmed. The Board addressed two issues: whether the bargaining unit petitioned for was prohibited under Section 7(a); and the appropriateness of the bargaining unit.

Section 7(a) of the IELRA provides, in relevant part:

> The sole appropriate bargaining unit for tenured and tenure-track academic faculty at each campus of the University of Illinois shall be a unit that is comprised of non-supervisory academic faculty employed more than half-time and that includes all tenured and tenure-track faculty of that University campus employed by the board of trustees in all of the campus's undergraduate, graduate and professional schools and degree and non-degree programs (with the exception of the college of medicine, the college of pharmacy, the college of dentistry, the college of law and the college of veterinary medicine, each of which shall have its own separate unit), regardless of current or historical representation rights of patterns or the application of any other factors. Any decision, rule, or regulation promulgated by the Board to the contrary shall be null and void.

The Employer argued that section 7(a) prohibits combining tenure system and non-tenure track faculty into one bargaining unit. The IELRB focused on the word "includes" because section 7(a) states that the appropriate bargaining unit "includes all tenure and tenure-track faculty of that University campus..." Citing several dictionary definitions and Illinois case law, the IELRB determined that "includes" does not limit the list, but what is listed is part of a group. To interpret "includes" in a narrowing manner, according to the Board, would be contrary to the goal of ensuring employees the fullest freedoms in exercising their rights.

The University also argued that the legislative history of Section 7(a) supported finding the bargaining unit inappropriate. Section 7(a) was amended effective January 1, 2004, removing the words "non-tenure track" from the language identifying the sole appropriate bargaining unit for academic faculty. The University noted the statement of the amendment's sponsor that the amendment would limit bargaining units at each campus of the University of Illinois to tenure and tenure-track faculty. The IELRB, however, found the language of the statute to be clear and unambiguous; thus, the Board reasoned, the statute must be interpreted as written and no reliance on statements of legislators was allowed.

The University also argued that there is a presumption that an amendment changes the law. The IELRB agreed but found that whereas the statute had previously required the inclusion of non-tenure track faculty in the same unit as tenure-system faculty, the amendment made such inclusion optional. The amendment also changed the prior requirement that the bargaining unit for faculty extend to all campuses of the University by providing separate bargaining units for each campus. The Board thus found no inconsistency between allowing non-tenure track and tenure system faculty to be in the same bargaining unit and the presumption that an amendment to a statute changes the law.

Therefore, the Board concluded that section 7(a) did not preclude combining tenure-system and non-tenure track faculty in the same unit.

The University also argued that the petitioned for bargaining unit would not be appropriate under traditional community of interest analysis because a significant conflict of interest existed between tenure system and non-tenure track faculty. The IELRB cited Section 1135.20(b)(1) of its regulations, which describes as presumptively appropriate for collective bargaining, the bargaining unit petitioned for at UIC. The Board found that there was insufficient evidence to overcome the presumption of appropriateness.

The University alleged that a conflict of interest existed between the tenure system and non-tenure track faculty because the role of the non-tenure track faculty is to support tenure system faculty. As such, non-tenure track faculty conduct certain research and teach certain classes in support of the tenure system faculty. The University also argued that the tenure system faculty has the right to determine whether committees will include non-tenure as well as tenure system employees. Finally, the University alleged that the two groups would have different goals in bargaining. As such, the tenure system and non-tenure system faculty have a conflict of interest that renders a bargaining unit containing both inappropriate.

The IELRB rejected these arguments. The Board found that non-tenure track faculty support of tenure system faculty does more to establish functional integration rather than conflict of interest. That the two groups would have different goals in bargaining is purely speculative according to the Board. And the tenure system faculty's right to determine if non-tenure track faculty can serve on committees was insufficient to establish a conflict of interest that would not allow the petitioned for bargaining unit to be certified.

The University also argued that its status as a research university made the bargaining unit inappropriate. The IELRB dismissed this argument, citing that non-tenure track faculty also conduct research. The Board then discussed the factors establishing a community of interest between the two faculty groups.

The IELRB noted that, in terms of employee skills and functions, both groups of faculty teach and perform research. In some cases, the tenure system and non-tenure track employees teach the same courses. The requirements for teaching classes, such as office hours, are the same for both tenure system and non-tenure track employees.

Non-tenure track employees and tenure track employees jointly teach courses and work together to obtain grants. This, along with the support provided to tenure system faculty by non-tenure system faculty, is an indication of functional integration.

Interchangeability was found by the Board in that the two faculty groups teach the same classes and that non-tenure track faculty substitute for tenure system faculty when tenure system faculty go on sabbatical. Further evidence was found in that non-tenure track faculty members have become tenure system members through searches for positions. There is also, at least the possibility, for tenure system faculty to become non-tenure track faculty, most commonly after they retire.

The Board found that contact occurred between the two faculty groups in that their offices are intermingled and that they attend the same trainings. Further evidence of contact was found when the two faculty groups serve on some of the same committees and work together in obtaining grants. The Board viewed the fact that non-tenure track faculty might work for a tenure system faculty as evidence of contact and not of a conflict of interest.

Although tenure system faculty are required to have a terminal degree in their academic field, only clinical and research non-tenure track faculty are required to have a terminal degree. However, testimony at the hearing established that lecturer and instructor non-tenure track faculty in at least two departments had the same terminal degrees as tenured faculty in the same departments. The two faculty groups were also found to have common supervision.

The Board acknowledged differences between the two faculty groups, such as higher pay, access to sabbatical leaves of absence, and the opportunity for life time job security for tenure system faculty. These differences, however, were outweighed by the factors the groups held in common. The Board rejected the University's argument that tenure should be given greater weight in a university setting than in a community college setting, where the courts had determined that tenure should not be given undue weight.

The Board focused on the similarities rather than the differences in the two faculty groups in order to assure the employees the greatest freedom in exercising the rights guaranteed by the Act. Therefore, the presumption of the appropriateness of the bargaining unit was not rebutted. The Board further stated that the petitioned for bargaining unit would be

appropriate even if the IELRB's rules which created the presumption of appropriateness had not been considered.

IELRB Chairman Lynn Sered dissented. In her view, the language of Section 7(a) clearly ruled null and void any regulation promulgated by the Board that was contrary to the amended language which had dropped the language regarding non-tenure track faculty. Therefore, the rule that the majority relied on is null and void. As such, two separate bargaining units for the two faculty groups would be appropriate, subject to the two groups meeting the requirements of the Act. The dissent also observed that most public universities in Illinois do not combine their tenure system and non-tenure track faculty into one bargaining unit.

The dissent assumed arguendo that the language of Section 7(a) is ambiguous; in such a case, other sources of legislative intent are to be considered, including the statement of the sponsor of the amendment that the majority rejected. The Chairman would have certified separate bargaining units for tenure-system and non-tenure track faculty.

IPLRA DEVELOPMENTS

Confidential Employees

In *Laborers International Union of North America, Local 751 and. County of Kankakee and Coroner of Kankakee County,* 28 PERI ¶ 21 (ILRB State Panel 2011), the State Panel held that an administrative assistant to the county coroner was not a confidential employee, reversing a decision of an administrative law judge. In January 2011, the ALJ recommend certification of a unit of part-time and full-time deputy coroners excluding the administrative assistant. The ALJ held the administrative assistant to be a confidential employee within Section 3(c) of the IPLRA, 5 ILCS 315 (2010).

In reversing, the State Panel observed that because there was no pre-existing collective bargaining relationship within the county coroner's office, the test for confidentiality focused not on whether the alleged confidential employee had access to confidential labor relations information or engaged in confidential functions that had a labor nexus, but on whether it was reasonable to expect the employee at issue to perform confidential work once a bargaining unit is established.

The administrative assistant in question was a sworn deputy coroner who, in addition to deputy coroner's duties, performed administrative work for the Coroner. The State Panel majority found it unclear whether once a bargaining relationship was established the administrative assistant would have access to bargaining proposals or confidential contract administration material. Furthermore, the majority reasoned, it was the County Board who controlled the budget and it was very likely that the County's Human Resources Department, which already was the lead for most of the county's other bargaining units, would also be the lead in coroner collective bargaining. To the majority, this removed the administrative assistant from the realm of confidential employee.

State Panel Member Kimbrough dissented. To Member Kimbrough, the Coroner was a department head and joint employer. The administrative assistant assisted the Coroner with budgets, typing, and file maintenance. Member Kimbrough saw no reason why those duties would be eliminated once bargaining and contract administration began. On the contrary, Member Kimbrough considered it highly likely that those duties would overlap with duties the Coroner, as a department head, would have in assisting the County Human Resources Department in bargaining and contract administration.

Duty to Bargain

In *Illinois Fraternal Order of Police, Labor Council and. County of St. Clair and Sheriff of St. Clair County*, 28 PERI ¶ 18 (ILRB State Panel 2011), the State Panel held that the employers failed to bargain in good faith where they unilaterally changed work assignments while interest arbitration was pending. The employers created a new "Metro Patrol Division" and assigned deputies from the new division to patrol the St. Louis area's MetroLink light rail system. Before the creation of the new Metro Patrol Division, the Sheriff's Road Deputy Division had performed the rail system's patrol assignments.

The employer did not challenge the ALJ's finding that its creation of the new division and work assignments constituted a transfer of work out of the Road Division bargaining unit. The employer argued that its actions were not a change in the status quo because no bargaining unit employee lost work or hours of employment. The State Panel rejected this argument, reasoning that transferring unit work impacts the unit as a whole, and accordingly the unit's status quo, whether or not its individual members feel the consequences.

The employer argued that the employees lacked reasonable expectations of having the work retained in the bargaining unit. The State Panel disagreed, Although there may have been reasons for

the employees to reasonably believe work on the MetroLink rail system was not guaranteed, the Panel rejected the idea it must engage in a reasonable belief or reasonable expectation analysis regarding the status quo where it was undisputed that work had been transferred out of the unit.

The employer took exception to the ALJ's finding that it failed to bargain over the effects of the decision to create a new Metro Patrol Division. The employer asserted (1) effects bargaining had not been before the ALJ and, (2) even if it had been, the employer had no duty to engage in effects bargaining absent a specific demand to do so from the union. The State Panel rejected both arguments. The union's complaint did protest the unilateral transfer of work, which encompassed a failure to bargain the effects as well as a failure to bargain the decision itself. Furthermore, the Panel reasoned, because the parties were in interest arbitration, the employers had a duty to refrain from changing the status quo without the union's consent. No separate demand to bargain from the union was required.

Joint Representation

In *International Brotherhood of Electrical Workers, Local 21 and City of Chicago*, No. L-CA-10-026 (ILRB Local Panel, 2011), the Local Panel reversed an administrative law judge's Recommended Decision and Order which found that the employer repudiated a collective bargaining agreement by unilaterally implementing terms of an agreement it reached with another union representing other employees within the same bargaining unit. This case concerned the City of Chicago's "Unit II" bargaining unit, which is jointly represented by the International Brotherhood of Electrical Workers, Local 21, ("IBEW") and the Service Employees International Union, Local 73 ("SEIU"). Both unions negotiate for the same collective bargaining agreement, but service individually only those employees who are members of their respective unions. At issue was whether IBEW's members were bound by concessions approved by a majority of the bargaining unit. IBEW serviced 375 of the 2,700 employees in the unit. SEIU serviced the rest.

In June of 2009, 289 bargaining unit employees had been served layoff notices. Only SEIU members were affected. Around the same time, the City of Chicago had been bargaining with a coalition of representatives of all of its bargaining units for uniform concessions known as the "Master COUPE Agreement," named for the Coalition of Unionized Public Employees. To avoid layoffs, representatives of Unit II met with the employer's representatives to create what would be referred to as a "Modified COUPE Agreement," which eliminated one general coalition concession: a reduced workweek. SEIU was willing to agree to waive a retroactive wage increase, among other things, to avoid layoffs. IBEW, whose members were not threatened with layoffs, was not amenable to these concessions.

Both unions put the employer's last, best and final offer to a vote. IBEW did not did not provide its membership with a copy of the Modified COUPE Agreement, but SEIU did. IBEW members voted overwhelmingly to reject the last, best and final offer, but SEIU members voted overwhelmingly to accept it. The votes were totaled, per custom, and the last, best and final offer and the Modified COUPE Agreement were accepted and implemented.

Relying on National Labor Relations Board precedent, IBEW argued that before it could be bound to the terms of the Modified COUPE Agreement, it must have actually assented to its terms. *CBS Broadcasting, Inc.*, 343 NLRB 871, 872 (2004). The Local Panel rejected this argument, labeling the portion of the CBS opinion on which IBEW relied as dicta. The Local Panel further reasoned that IBEW was fully aware of the terms of the Modified COUPE Agreement even if it did not submit its terms to its members. It also found that the City had bargained with both joint representatives to impasse. The Local Panel found that the City engaged in negotiations with both joint representatives, and that it simply acquiesced to SEIU's demands but not to the demands of IBEW. It further found that IBEW members "clearly enjoyed the benefits derived from these negotiations," pointing to, among other things, wage increases. It found that the City had bargained with IBEW to impasse as evidenced by IBEW's submission of the City's last, best, final offer to its membership for a vote. The Local Panel cited *CBS Broadcasting, Inc.* for the proposition that "[e]mployers have an obligation to bargain with joint representatives on a joint basis." 343 NLRB at 872. Because the employer bargained to impasse, it did not matter that it acquiesced to some concessions and not others.

Local Panel Member Sadlowski concurred in part and dissented in part. He agreed that the City had not repudiated the Unit II collective bargaining agreement but wrote that the City engaged in "too few [bargaining sessions] to warrant finding an impasse under most circumstances." He would have

affirmed that portion of the ALJ's Recommended Decision and Order that found the City in violation of Sections 10(a)(4) and (1) of the act. ♦

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